FOURTH DIVISION
September 26, 2013

No. 1-12-0972

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE STATE OF ILLINOIS, ex rel. JOSEPH PUSATERI, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 09 L 010387
THE PEOPLES GAS LIGHT AND COKE COMPANY, a regulated gas utility company, Defendant-Appellee.	)	Honorable Raymond W. Mitchell, Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justice Taylor concurred in the judgment.
Justice Palmer dissented.

ORDER

¶ 1 *Held:* The trial court's order dismissing plaintiff's complaint under the Whistleblower Reward and Protection Act (Whistleblower Act) with prejudice is reversed. The complaint states a cause of action under the Whistleblower Act and the information that forms the basis of the complaint has not been publicly disclosed.

¶ 2 Plaintiff Joseph Pusateri filed a complaint under the Whistleblower Reward and Protection Act (Whistleblower Act) against defendant the Peoples Gas Light and Coke Company (PG) alleging defendant submitted falsified gas leak response time reports to the Illinois Commerce Commission (ICC) to obtain a rate increase and subsequently its customers, including the State, paid the fraudulently obtained rates. The trial court dismissed plaintiff's complaint with prejudice because the ICC is not required to consider PG's safety record in approving a rate increase and it found, therefore, that as a matter of law there is no causal connection between the falsified reports and rate increases. For the following reasons, we reverse.

¶ 3 BACKGROUND

¶ 4 1. Procedural History

¶ 5 On September 2, 2009, relator Joseph Pusateri filed a complaint under seal pursuant to the Whistleblower Act (740 ILCS 175/1 (West 2008)). On April 27, 2011, the trial court entered an order on the State's notice of its election to decline to intervene in the proceedings. The court ordered that relator shall conduct the action on behalf of the State as the plaintiff, unsealed the complaint, and ordered service on defendant Peoples Gas Light and Coke Company (PG). Plaintiff's complaint seeks to recover treble damages and civil penalties on behalf of the State against defendant for submitting or causing to be submitted false or fraudulent claims and/or information to the State. The false information was the basis of an artificial safety record which the State relied on to approve rate increases for PG's utility. The complaint alleges the State purchased natural gas from PG at these fraudulently inflated rates.

¶ 6 On September 19, 2011, defendant filed a combined motion to dismiss plaintiff's

complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2010)). Defendant's section 2-615 motion argued that the facts alleged in the complaint do not constitute a false claim under the Whistleblower Act. Defendant's section 2-619 motion argued plaintiff is not an original source of the information alleged in the complaint, therefore the court lacks jurisdiction over the complaint. On November 22, 2011, plaintiff filed a response in which he requested leave to file an amended complaint if the court finds the complaint factually insufficient.

¶ 7 The trial court held a hearing on the motion to dismiss on February 24, 2012. On February 29, 2012, the court entered a written order granting defendant's section 2-615 motion to dismiss. The court found that "because there is a clear legal impediment to Plaintiff's claim, any proposed amendment would be futile." The court found it unnecessary to reach defendant's alternative grounds for dismissal and dismissed the complaint with prejudice.

¶ 8 2. Plaintiff's Allegations

¶ 9 Because this case was dismissed at the pleading stage, we accept the well-pled allegations in plaintiff's complaint as true. The relevant allegations gleaned from the complaint, taken as true, are as follows: PG is a natural gas utility company. PG responds to customer reports of possible gas leaks. If PG does not arrive at the scene of the possible gas leak within one hour of the first report of the possible gas leak, PG is required to generate a written report to the Illinois Commerce Commission (ICC). The time the gas leak is reported and the time PG arrives at the scene of the report are recorded in a single computer system.

¶ 10 Plaintiff is PG's former employee. Plaintiff achieved a management-level position as a

service supervisor on December 2, 2001. The complaint alleges that "[s]ubsequent to his promotion to management, Plaintiff was instructed by his superiors to falsify response times on the Defendant's gas leak reports." The complaint does not allege how long after plaintiff became a service supervisor PG instructed him to falsify response times. The complaint alleges that "Plaintiff, along with other members of the management, would access the Defendant's computer system, and, for those gas leak reports where response time exceeded one hour, would alter the dispatched crew's arrival time on the scene so that response time is less than one hour." The complaint does not allege how many members of management participated in this practice. The complaint does not allege whether management changed response times for every reported gas leak, for a percentage of reports and what that percentage was, whether it did so routinely or only during periods of high report volume, whether management only changed response times where the actual response time exceeded a certain threshold such as 90 minutes or 2 hours, or any other metric of the pervasiveness or scope of this practice.

¶ 11 The complaint goes on to allege that "[t]hose falsified gas leak reports would be submitted to the ICC and present an inaccurate picture of the Defendant's safety record." Plaintiff alleges "[a]s prescribed by regulation, the Defendant has to request the ICC for a rate increase, and warrants and supports its request by using the false safety record as one *** basis" and "[r]esulting higher rates increase the costs of natural gas for all consumers including the State." The complaint does not allege the dates of any specific rate increase the ICC awarded to PG based on the falsified records.

¶ 12 The complaint seeks relief pursuant to sections 3(a)(1) and 3(a)(2) of the Whistleblower

Act in that defendant "knowingly presented or caused to be presented a false or fraudulent safety record used by the State, or its agency, to approve rate increases" (740 ILCS 175/3(a)(1) (West 2008)) and "knowingly made, used, or caused to be made or used false records or statements to get a false or fraudulent claim paid or approved by the State" (740 ILCS 175/3(a)(2) (West 2008)).

¶ 13 ANALYSIS

¶ 14 > "A section 2–615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. A cause of action should not be dismissed pursuant to a section 2–615 motion unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. In ruling on such a motion, only those facts apparent from the face of the pleadings [and] matters of which the court can take judicial notice *** may be considered. We accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. However, a plaintiff may not rely on mere conclusions of law or fact unsupported by specific factual allegations. We review *de novo* an order granting a section 2–615 motion to dismiss." *Cooney v. Magnabosco*, 407 Ill. App. 3d 264, 267 (2011).

¶ 15 We also review an order dismissing a cause pursuant to section 2–619 for lack of jurisdiction *de novo*. *Country Insurance and Financial Services v. Roberts*, 2011 IL App (1st) 103402, ¶8 (2011). When resolving motions to dismiss under either section 2–615 or section 2–619, the court is required to accept as true all well-pled factual allegations. *Morris v. Illinois Central Rail Co.*, 382 Ill. App. 3d 884, 886 (2008).

¶ 16 Section 3 of the Whistleblower Act provides, in pertinent part, as follows:

> "(a) Liability for certain acts. Any person who:
>
> (1) knowingly presents, or causes to be presented, *** a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the State;
>
> ***
>
> is liable to the State for a civil penalty of not less than $5,500 and not more than $11,000, plus 3 times the amount of damages which the State sustains because of the act of that person. A person violating this subsection (a) shall also be liable to the State for the costs of a civil action brought to recover any such penalty or damages.
>
> ***
>
> (c) Claim defined. As used in this Section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the State provides any portion of the money or property which is requested or demanded, or if the State will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 740 ILCS 175/3 (West 2008).

¶ 17 Defendant argues the trial court's judgment should be affirmed because plaintiff's complaint contains no allegations that defendant submitted a false claim for payment to the State. Even if plaintiff's allegations are construed to allege defendant submitted a claim, defendant also argues that plaintiff was required, but failed, to allege the false claim formed the basis of a payment or approval of payment. Defendant argues that any allegations of a connection between false gas leak response time reports and the rate increase approval process are too *de minimis* to

survive its motion to dismiss. Nor, defendant argues, can plaintiff plead the required nexus between a false "claim" and payment by the State, because the ICC does not base rates on gas leak response times "at all."

¶ 18 Plaintiff argues that his allegation that defendant used false safety records to obtain a rate increase brings his claim within the Whistleblower Act. Plaintiff replies the complaint alleges that the false statements have a direct causal relationship with the claim for State funds in the form of a rate increase because the complaint alleges the falsified reports had the purpose and effect of inducing the ICC's approval of a rate increase. Plaintiff asserts that defendant's argument that there is no causal connection between the falsified reports and a rate increase is based on the false premise that because the Illinois Administrative Code (Code) enumerates the factors the ICC considers in approving a rate increase, the ICC did not consider a non-enumerated factor. Plaintiff notes that the relevant sections of the Code do not mandate the ICC to consider only the materials and information requested by those sections.

¶ 19 Plaintiff replies the dispositive fact is that, regardless of whether defendant is required to submit gas leak response time reports, the complaint alleges defendant did submit such reports and that the ICC did consider them in determining its rate increase; therefore the trial court erred in dismissing plaintiff's complaint with prejudice. We agree. We find persuasive plaintiff's argument that the absence of a requirement in the Code for PG to submit safety information is not determinative of whether defendant *did* submit the information or whether the ICC *did* consider the information. That is precisely what the complaint alleges did occur, and based on that allegation, plaintiff can state a claim under the Whistleblower Act.

¶ 20

> "[T]o succeed in a *** cause of action based on false submission of claims, a plaintiff must prove that (1) the defendant submitted or caused to be submitted a claim to the government, (2) the claim was false or fraudulent and (3) the defendant knew it was false or fraudulent. With respect to a cause of action based on the use of a false statement, a plaintiff must prove (1) the defendant made or used a statement in order to get the government to pay money, (2) the statement was false or fraudulent and (3) the defendant knew it was false or fraudulent." (Internal citation omitted.) *United States, ex rel. Humphrey v. Franklin-Williamson Human Services*, 189 F. Supp. 2d 862, 866-67 (S.D. Ill. 2002)[1].

"[O]ne who submits a false record in order to get the State to pay or approve any part of a request or demand violates section 3(a)(2)." *People ex rel. Levenstein v. Salafsky*, 338 Ill. App. 3d 936, 943 (2003). "[T]here *** must be some nexus between the claim and the State's funds or property." *Id*. at 943.

¶ 21 Plaintiff's complaint alleges defendant used false records or statements to get a false or fraudulent claim paid. 740 ILCS 175/3(a)(2). We must accept as true plaintiff's allegation that PG "support[ed] its request [for a rate increase] by using the false safety record as one of the basis [*sic*]." The trial court construed this allegation as a "conclusion of law that is legally erroneous." We agree that the allegation is inartfully drafted and may be read to allege that PG submitted the falsified reports pursuant to regulations concerning rate increases. That allegation

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[1] *United States ex rel. Humphrey* involved claims under the federal False Claims Act (FCA) (31 U.S.C. § 3729 *et seq*.) and the Whistleblower Act. The court expressly found that "[the Whistleblower Act] tracks the relevant provisions of the FCA almost word for word, substituting the appropriate state references for the federal ones in the FCA. *** [B]ecause [the Whistleblower Act] is virtually identical in all relevant aspects to the FCA, the Court will look to FCA caselaw for guidance ***." *United States ex rel. Humphrey*, 189 F. Supp. 2d at 866-67.

would be erroneous as a matter of law and the trial court would be correct in finding that it should not be taken as true. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶35 (2013) ("bare conclusions of law or conclusory factual allegations unsupported by specific facts are not deemed admitted for the purposes of a section 2–615 motion to dismiss"). However, the allegation may also be construed, we admit liberally[2], to allege that (1) PG must request a rate increase from the ICC and (2) within that process, although not required to do so by law (because the following allegation appears in a separate clause), PG uses the falsified reports to support its request. These allegations bring the submission of the falsified reports within the Whistleblower Act as a submission of a false report to the State and demonstrate the required nexus between the submission of the false report and the payment of State funds because the complaint also alleges that the rates charged to the State were a consequence of defendant's submission of falsified reports.

¶ 22 Plaintiff's complaint makes allegations regarding the "Resulting higher rates" and that those rates increased the cost of natural gas to the State. Count I of the complaint seeking damages under section 3(a)(1) actually pleads that defendant submitted a false safety record to approve rate increases, resulting in damages. However, the complaint also alleges that the submission of the falsified records "[r]esulted [in] higher rates increas[ing] the costs of natural gas for all consumers including the State." The complaint may be liberally construed to allege

[2] "The complaint is to be construed liberally and should only be dismissed when it appears that plaintiff could not recover under any set of facts." *Iseberg v. Gross*, 366 Ill. App. 3d 857, 861 (2006).

that defendant presented a "false claim" for payment for natural gas based on fraudulent utility rates. Read in this way, the complaint alleges that PG (1) submitted false information to the State to obtain a rate which it (2) subsequently charged to the State knowing the rate was fraudulent. The rate charged to the State was fraudulent because PG knew it was obtained using falsified records. Therefore, the complaint is sufficient to state a claim under section 3(a)(1) in that PG knowingly presented a false claim for payment, and the allegations are also sufficient to state a claim under section 3(a)(2) because it is a reasonable inference[3] that when PG submitted the falsified records to obtain the fraudulent rate it did so knowing it would later charge the rate it achieved to the State. Thereby PG knowingly used a false record to get a fraudulent claim paid.

¶ 23 We note that in the argument on defendant's motion to dismiss, plaintiff's counsel argued for the construction of the complaint which we construed from its plain language.

> "MR. STAWICKI [Plaintiff's counsel]: Well, the point I am trying to make, your Honor, is that they could have put, for instance, this in, in addition to those other things. There's nothing before you which says that they didn't.
>
> They're trying to say regulation requires A, B, and C. This is not on that list; therefore, it didn't happen. That's inappropriate ***. It doesn't matter what was required. What matters is what happened.

[3] "In reviewing the sufficiency of a complaint, we accept as true all well-pled facts and reasonable inferences that may be drawn from those facts." *Iseberg*, 366 Ill. App. 3d at 860.

***

THE COURT:	"[T]hey could have a policy to falsify their safety record, but it's completely irrespective of anything having to do with seeking rate increases.
MR. STAWICKI:	That's not what's alleged in our complaint ***."

¶ 24 We also find that there is "some nexus between the claim and the State's funds." Initially, we note that in *Bantsolas v. Superior Air & Ground Ambulance Transport, Inc.*, No. 01 C 6168 (N.D. Ill. 2004), the court found the allegations, "while inartfully pled, are sufficient to state a claim under the Whistleblower Act" where the plaintiff only alleged that " 'by reason of the false claims *** the State of Illinois has incurred damages to be proven at trial.' " "[W]ith that allegation, it was alleged, or at least implied, that false claims were submitted to the State of Illinois which caused the State to be damaged." (Internal quotation marks and citation omitted.) *Id*. Here, plaintiff pled that by virtue of both using the false records to get a fraudulent claim paid, and by virtue of the fraudulent claim itself, the State suffered damages. Such allegations would be sufficient on their own to allege a nexus under the Whistleblower Act. *Id*.

¶ 25 Moreover, we find *Illinois Health Facilities Authority, ex rel. Scachitti v. Morgan Stanley Dean Witter and Co.*, 381 Ill. App. 3d 823, 824 (2008), instructive on the question of whether a causal chain exists between defendant's conduct and the State's funds. There, the plaintiffs alleged that the defendant fraudulently issued a materially false report that caused the Illinois Health Facilities Authority (Authority) to over-pay for Treasury bonds. *Id*. at 824. The Authority hired the defendant Ernst and Young, LLP (Ernst) to verify the yield on Treasury

bonds underwritten by the defendant Morgan Stanley Dean Witter and Company (Morgan Stanley). Ernst provided the Authority with a written statement verifying the yield. The complaint alleged that Morgan Stanley inflated the charge for the Treasury bonds, resulting in an overcharge to the Authority. The complaint also alleged that Ernst "knowingly and fraudulently based its yield calculation on the marked-up purchase price of the Treasury bonds *** which would have resulted in the true yield." *Id*. at 824-25.

¶ 26 The complaint "alleged in pertinent part that Ernst & Young violated sections 3(a)(1) and 3(a)(2) by knowingly submitting the materially false verification report, causing the Authority to pay Morgan Stanley's fraudulent, above-market price for the Treasury bonds." *Morgan Stanley Dean Witter and Co.*, 381 Ill. App. 3d at 825. This court found that the complaint stated a cause of action pursuant to section 3(a)(2) of the Whistleblower Act. *Id*. at 827. The court found that the complaint alleged that Ernst made a false report to the Authority, which caused the Authority to "pay Morgan Stanley's fraudulent, 'marked-up' price for the Treasury bonds." *Id*. at 826. "These allegations state a cause of action under section 3(a)(2)." *Id*. The allegations against Ernst are very similar to plaintiff's allegations against PG. Plaintiff alleges PG submitted false information to the ICC, which in turn caused the State to pay "marked up" gas bills. We find that under *Morgan Stanley Dean Witter and Co*., plaintiff's allegations are sufficient to state a cause of action under section 3(a)(2).

¶ 27 Further, we find that *Morgan Stanley Dean Witter and Co.* supports our finding that plaintiff's complaint is also sufficient to state a cause of action under section 3(a)(1). The *Morgan Stanley Dean Witter and Co.* court found that the plaintiffs in that case did not state a

cause of action under section 3(a)(1) because the plaintiffs' complaint did not allege that Ernst presented a claim for payment or that Ernst caused Morgan Stanley to present a claim for payment. *Id*. at 826. "Instead, plaintiffs allege that Ernst & Young filed a materially false verification report, which caused the Authority to pay Morgan Stanley's fraudulent claim." The court held those allegations, "even if proved true, do not give rise to liability under section 3(a)(1)." *Id*.

¶ 28 In this case, however, plaintiff did allege that defendant presented a claim for payment. As previously discussed, the complaint, liberally construed, alleges that defendant submitted fraudulent natural gas bills to the State. Thus, we also find that under *Morgan Stanley Dean Witter and Co*., plaintiff's allegations are sufficient to state a cause of action under section 3(a)(1). "The question presented by a section 2-615 motion to dismiss is whether, taking all well-pleaded facts as true and considering them in the light most favorable to the plaintiff, the plaintiff has alleged sufficient facts which, if proved, would entitle the plaintiff to relief." *Jackson v. Michael Reese Hospital and Medical Center*, 294 Ill. App. 3d 1, 9-10 (1997). The merits of the case are not considered. *Id*. We find plaintiff has surpassed this threshold.

¶ 29 Alternatively, defendant argued the trial court's judgment may be affirmed because plaintiff is not the "original source" of information concerning defendant's false gas leak reports, and that fact is a jurisdictional bar to plaintiff's claim under the Whistleblower Act. 740 ILCS 175/4(e)(4)(A) (West 2008). Section 4(e) reads, in pertinent part, as follows:

> "No court shall have jurisdiction over an action under this Section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a legislative,

> administrative, or Auditor General's report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph (4), 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State before filing an action under this Section which is based on the information." 740 ILCS 175/4(e)(4) (West 2008).

¶ 30 "Both section 3730(e)(4)(A) of the FCA and the virtually identical section 4(e)(4)(A) of [the Whistleblower Act] provide a public disclosure bar unless *** the action is brought by the Attorney General or by a person who is an original source of the information." *State, ex rel. Beeler, Schad & Diamond, P.C. v. Target Corp.*, 367 Ill. App. 3d 860, 867 (2006). This means that "once information becomes public, only the Attorney General and a relator who is an 'original source' of the information may represent the [State]." *Id*. at 866. Thus, "once the court has determined that a public disclosure has been made, it must then determine whether the relator is the original source." *Id*. at 867.

¶ 31 Defendant argues that a February 2009 safety audit included its gas leak response time reports, which predates the filing of plaintiff's complaint and constitutes a public disclosure. Defendant argues that plaintiff's allegations are based upon a prior public disclosure because the gas leak reports were the subject matter of the ICC's audit; therefore plaintiff is not the original source of the information upon which his claims are based.

¶ 32 In support of its argument that there was a prior public disclosure of the information on which plaintiff's complaint is based, defendant relies on a correspondence between it and the

ICC. Defendant's letter to the ICC is in "response to the issues identified from the February 2009 Records Audit of Leak Repair & Monitoring and Customer Leak Complaint Records." Defendant's letter to the ICC begins by listing issues that were identified on an "Exit Meeting Documentation Form," then provides a response to those issues. The pertinent "issue" that arose from the February 2009 audit was described as follows:

> "Reviewed customer leak complaint response times to determine the number of calls exceeding 60 minutes. The review found response reasons that were not adequate to determine what caused the arrival time to exceed 60 minutes. Staff requests that Peoples gas [*sic*] provide during future inspections a breakdown by providing annual and monthly leak order tracking reports for each shop. Staff requests that Peoples Gas develop a uniform reporting system for customer leak complaints in all three shops."

¶ 33 Defendant's response to the issue in the letter was as follows:

> "PGL will comply with items requested for future audits, providing annual and monthly leak order tracking reports for each shop. A uniform reporting system for leak complaints is in development, which will be ready by May 7, 2009."

¶ 34 Based on the foregoing, defendant argues that when plaintiff filed this lawsuit, the ICC was already aware of "issues" with gas leak response times both from the ICC's own audit and defendant's response to the ICC's request for information on leak report data after the audit.

> "[A] 'public disclosure' occurs when the critical elements exposing the transaction as fraudulent are placed in the public domain. *** [A] public disclosure brings to the attention of the relevant authority that there has been a false claim against the government. The public-disclosure bar is designed to prevent lawsuits by private citizens in such situations because where a public disclosure has occurred, that authority is already in a position to vindicate society's interests, and a *qui tam* action would serve no purpose." (Internal quotation marks and citations omitted.) *Glaser v. Wound*

Care Consultants, Inc., 570 F.3d 907, 913 (7th Cir. 2009).

¶ 35 We find there is no evidence that the information upon which plaintiff's complaint is based has been publicly disclosed. The evidence in the record only establishes that the ICC was aware that defendant's reports to the ICC were insufficient to explain why it had taken more than 60 minutes to arrive at the scene of a possible gas leak. The ICC then appears to request additional reports, and that defendant implement a uniform system for customer leak complaints, presumably to standardize how defendant reports the cause of the delay as to avoid similar confusion during future audits. There is no evidence that anything about the audit brought the critical element of the alleged fraud, *i.e.* that the leak complaint response time reports had been falsified, to the attention of the ICC. Based on the record before us, the ICC's primary concern appears to have been with the content of the reports, not their veracity. To conclude otherwise is nothing more than speculation. There is nothing in the record to indicate that the ICC was aware that the reports PG submitted were fraudulent.

¶ 36 The trial court also noted that the letter on which defendant relies "just says *** 'Sometimes we're in excess of 60 minutes.' It doesn't say, 'And by the way, we have falsely represented to you in other documents that we're under 60 minutes.' " Defendant's counsel admitted the court's reading was "one potential reading" but argued for "the better reading" that there is inadequate support for the conclusion and, regardless, plaintiff's allegations are based on information that is sufficiently similar to the information previously disclosed to preclude jurisdiction over plaintiff's claim.

¶ 37 When the plaintiff's allegations are substantially similar to information about an alleged

fraud that is already publicly disclosed, the statute permits the relator to avoid the jurisdictional bar only if he was an original source of the information. *Glaser*, 570 F.3d at 910. However, the jurisdictional inquiry is sequential in nature, and the court reaches the original source question only if it finds the plaintiff's suit is based on information that has already been publicly disclosed. *Glaser*, 570 F.3d at 919. Plaintiff's counsel argued to the trial court that there was "no competent evidence before this Court which shows that someone from the defendant's organization informed the State about the defendant's use of falsified reports before the plaintiff did ***." We agree. All that is shown by the correspondence in the record is that gas leak response time reports regarding calls where PG did not arrive within 60 minutes failed to adequately explain the delay. The letter indicates the ICC reviewed customer leak complaints to determine the number of responses that exceeded 60 minutes, but there is nothing to indicate any information that would even suggest to the ICC that the number was under reported because of PG's falsification of the records.

¶ 38 Because we find the record does not contain evidence of a public disclosure of the information that forms the basis of plaintiff's complaint, we have no need to determine whether plaintiff's allegations are substantially similar to the information known by the ICC. Defendant's motion to dismiss plaintiff's complaint for lack of jurisdiction under section 4(e) of the Whistleblower Act is denied.

¶ 39 CONCLUSION

¶ 40 Plaintiff's complaint states a cause of action under section 3(a)(1) and 3(a)(2) of the Whistleblower Act. Defendant's arguments, that the ICC did not consider falsified gas leak

response time reports in granting any rate increase, or that the ICC was aware that its gas leak reports inaccurately stated their response times, are better resolved by summary judgment, where defendant can produce evidence in support of the facts forming the basis of those claims. At this stage of proceedings, however, dismissal with prejudice was premature, and the trial court's judgment dismissing plaintiff's complaint was erroneous. Accordingly, the trial court's judgment is reversed.

¶ 41 Reversed.

¶ 42 JUSTICE PALMER, dissenting.

¶ 43 I respectfully dissent. I would uphold the trial court's ruling that the complaint failed to state a cause of action, albeit on slightly different grounds. See *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 204 (2007) (appellate court may affirm the trial court's judgment on any basis appearing in the record, regardless of whether the trial court relied on that basis and regardless of whether the trial court's reasoning was correct).

¶ 44 As relevant here, Section 3 of the Whistleblower Act provides for civil penalties and treble damages in the event that a person knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the State. 740 ILCS 175/3(a)(1)(g) (West 2008). A claim is defined as any request or demand for money or property which is made to a contractor, grantee, or other recipient if the State provides any portion of the money or property which is requested or demanded. 740 ILCS 175/3(b)(2)(A) (West 2008). Thus, in order for the Whistleblower Act to apply, a claim for payment involving the State's money must be made and a false record or statement must be used to get that claim paid. I agree with Peoples Gas that this complaint does not allege the presentation of a claim as contemplated by the Whistleblower Act.

¶ 45 This act is about the government procurement process, it is about the government's bills. When a bill is presented for payment that involves the State's money, the statements and reports supporting the demand for payment must be true. Most respectfully, I do not believe that this case is about the government's bills. It is about another process during which false statements should not be made, the legislative function of the ICC and its rate making process. False

statements to the ICC are surely not to be tolerated and certainly can be the subject of a myriad of causes of action regarding fraudulent conduct. However, I feel that applying the false claims section of the Whistleblower Act to the ICC's legislative process is an unwarranted extension which has no support in the case law. As this act is punitive in nature, it should be strictly construed.

¶ 46 I do not believe that our decision in *Illinois Health Facilities Authority v Morgan Stanley Dean Witter and Co*., 381 Ill. App. 3d 923 (2008), supports the decision to apply the Whistleblower Act to the case at bar. That case involved an actual transaction, the purchase of Treasury bonds by the Illinois Health Facilities Authority at an allegedly inflated price which was supported by the verification of the defendant Ernst & Young. The Authority bought the bonds, a claim was made for payment, the amount demanded was verified by an allegedly false statement and so we held a cause of action had been sufficiently alleged under the Whistleblower Act. That is not the case here. There is not an actual transaction involved and no claim has been made supported by a false statement or report. I would affirm the trial court's dismissal of the complaint for failure to state a cause of action.